STATE OF MICHIGAN

COURT OF APPEALS

WESLEY GIBSON, as Next Friend of TYLER GIBSON, a Minor, Plaintiff-Appellant,	UNPUBLISHED June 21, 2011
v	No. 296659 Macomb Circuit Court
VEI FRIENDLY, L.L.C., d/b/a STERLING LANES, Defendant-Appellee.	LC No. 2009-000877-NO

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, as next friend of Tyler Gibson, a minor, appeals as of right an order granting summary disposition in favor of defendant in this premises liability case. We affirm.

On appeal, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition because the dangerous condition was not open and obvious to a reasonably careful minor and the alleged dangerous condition contained special aspects. We review de novo a trial court's decision on a motion for summary disposition granted under MCR 2.116(C)(10). *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660 NW2d 351 (2003). We consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate when the evidence fails to establish a genuine issue of material fact. *Id.*

Tyler was injured while bowling at the Junior Gold Championship Tournament held at defendant's premises. Tyler's finger was injured when, while swinging a bowling ball in his approach to the lane, his finger struck a metal bracket that was suspended over the approach. The bracket is part of an overhead scoring system. The system and its metal support structure are clearly visible. It runs the length of the bowling center and extends into the approach of all 40 bowling lanes.

It is well established that a landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty does not exist for dangers that are "'known to the invitee or are so obvious that the invitee

might reasonably be expected to discover them.'" *Id.* (citation omitted). Although the existence of special aspects to an otherwise visible or obvious condition can create a duty on the part of a landowner, "only those special aspects that give rise to uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519. To determine whether a condition presents an open and obvious danger, an objective test is used to establish whether an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

Plaintiff argues that these cases are inapplicable because they involve adults and Tyler was a minor, to whom a different standard applied, and that the trial court erred in failing to address this difference. We agree with plaintiff that defendant owed Tyler a different duty of care given his status as a minor and that the trial court erred for failing to address the issue. Nevertheless, the application of the proper standard does not alter the disposition of his claim.

In *Bragan v Symanzik*, 263 Mich App 324, 333; 687 NW2d 881 (2004), this Court held "that landowners owe a heightened duty of care to child invitees." However, it did not conclude that claims brought on behalf of minors were universally exempt from the open and obvious doctrine. Instead, it held that courts "must consider whether a dangerous condition would be open and obvious to a reasonably careful minor; that is, ***whether the minor would discover the danger and appreciate the risk of harm***." *Id.* at 335 (emphasis added). In making that determination we must evaluate the premises "from the position or perspective of a reasonably prudent child of like age." *Id.* at 344 (MURPHY, J. concurring). Since Tyler was 16 years old, we must consider whether a reasonably careful 16-year-old would discover the danger and appreciate the risk of harm. *Id.* at 335.

Making such a determination is far more difficult, however, than is reciting the standard. As most any parent in Michigan can attest, there are 16-year-olds who, given their level of cognitive maturity, have the same ability to discover danger and appreciate the risk of harm as do most adults. There are other 16-year-olds, further from their ultimate level of adult development, whose ability to discover danger and appreciate risk may be closer to that of a young child. While the notion of a "reasonable" adult is a legal construct, it is at least a construct of an objective standard based on fully-developed adult capacities. By contrast, the construct of a "reasonable 16-year-old" is far less articulable given the varying levels of cognitive and other developmental levels in children of that age.

Whether a particular danger is open and obvious is a question of fact, but may be determined by the court where reasonable jurors could not disagree. See *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002). In this case, we conclude that a reasonable juror could not conclude that the overhead metal bracket that caused plaintiff's injury was not readily visible to a reasonable 16-year-old. The bracket was in plain sight; it was not disguised or covered in any fashion and nothing obstructed the view of it. It ran the entire length of the bowling alley, its height was constant and it was highly visible. Indeed, plaintiff concedes that

he saw the bar. While plaintiff now points to a particular piece of metal extending from the bar as the cause of his injury, that metal piece is also fully visible and he concedes that at a later visit he observed it.[1] Thus, the hazard was visible and discoverable, even to a 16-year-old.

The question, then, is whether there is a question of fact whether a reasonable 16-year-old would not appreciate the risk of harm if his backswing were to occur directly beneath the bracket. We conclude that a reasonable juror would have to find that even a relatively immature 16-year-old would understand that swinging a bowling ball directly beneath the hard metal bracket created a significant risk of hand injury.[2]

The facts in this case are quite different than those in *Bragan*, 263 Mich App 324. That case involved a play structure in barn where it was intended that children would fall from a ladder and land on a deep pile of straw. *Id.* at 326. The 11-year-old plaintiff in that case was playing on the structure but, when he fell, the straw had largely been dissipated, causing him to fall directly onto the hard wood floor, causing injury. *Id.* We held in *Bragan* that there was a question of fact with regard to whether a reasonable 11-year-old would be aware of the temporary reduction in the amount of straw and recognize the risk of falling at that moment. *Id.* at 335-336. Here, however, the hazard remained consistent at each lane that plaintiff bowled. There was always a bar above him in his path and the hazard did not change over time. For this reason we conclude that no reasonable jury could find that even relatively immature 16-year-olds, particularly those who have bowled often enough to be participating in a high level tournament, do not possess the experience and understanding to realize that a low-hanging metal bar suspended over a bowling lane creates a risk of injury, particularly to the hand used to raise the bowling ball. Based on the record in this case, and viewing the evidence in the light most favorable to plaintiff, it was reasonable to expect that even a relatively immature 16-year-old would, upon casual inspection, discover the overhead metal frame and have the capacity to understand the resulting risk. *O'Donnell v Garasic*, 259 Mich App 569, 575; 676 NW2d 213 (2003).

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[1] In addition, at the time of his deposition, plaintiff testified that he could not say whether he struck the full bracket or the piece of metal extending from the bracket that he now claims to have struck.

[2] We do note the irony of this holding in light of defendant's argument that it did not have notice that the bar suspended over the bowlers' approach lane represented a hazard because only a few bowlers had previously complained about it. Contrary to defendant's suggestion, where, as here, the hazardous object is permanent and the premises owner is aware of its presence, the question is whether a reasonable adult premises owner should have recognized that it created a risk of harm to his patrons. The occurrence of complaints and prior injuries is a significant factor where transient or unexpected hazards arise. However, where the hazard is permanent and known to the premises owner, he need not receive complaints or have knowledge of prior injuries to be on notice that a hazard exists.

Plaintiff further argues that, even if the dangers of the condition were open and obvious, the condition contained special aspects. Specifically, plaintiff contends that the condition is effectively unavoidable and points to several other instances where accomplished bowlers struck their bowling balls on the metal frame supporting the scoring system.

"Special aspects" exist when (1) a high likelihood of harm exists, such as a condition that is "effectively unavoidable" *or* (2) a condition poses an "unreasonably high risk of severe harm." *Lugo*, 464 Mich at 517-518. Here, plaintiff asserts that there is a question of fact as to whether the bar was "effectively unavoidable." Plaintiff notes that the overhang is only seven and one-half feet above the floor and that Tyler is 6'4" and "has been taught to use a high backswing in order to increase the velocity of his shot." While this shows that the bar did create a hazard, plaintiff has provided no evidence that this condition was unavoidable. Indeed, plaintiff submitted affidavits that suggested the condition is avoidable by altering one's approach.[3] In addition, Tyler, himself, avoided the condition on at least eight prior deliveries. Tyler delivered eight to ten balls on several lanes without incident. He also delivered one ball on lane number 18 before the incident. Finally, although we stated above that the lack of a significant complaint history did not demonstrate a lack of notice, the absence of complaints or prior injuries is relevant to our finding that the hazard was not effectively unavoidable.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

[3] Plaintiff submitted several affidavits from experienced bowlers who asserted that, on several occasions, they struck the low hanging metal frame on defendant's premises. However, the bowlers also asserted that they could avoid impacting the metal frame by changing their approach.